IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

GENERAL ELECTRIC CREDIT CORPORATION,

Plaintiff,

vs.

T. R. GRUBBS, dba T. R. GRUBBS TIRE & APPLIANCE,

Defendant.

Civil Action No. 1273

JUDGMENT

BE IT REMEMBERED that on the 20th day of October, A.D., 1969, came on to be heard the above styled and numbered cause at the special date and time set by the Court for the trial of said cause on the merits and thereupon came and appeared all parties herein, in person or through their duly authorized attorneys of record, and all parties announced ready for trial, and a jury being waived by all parties and the case being submitted to the Court for determination, both as to law and facts. The Court thereupon proceeded to hear the evidence adduced by all parties and the argument of counsel, and the Court having requested and received briefs from parties which were duly considered, the Court thereupon found and made certain facts and conclusions of law which are filed in this cause and are here referred to; and the Court thereupon determined that the facts and the law were with the Cross-Plaintiff, T. R. Grubbs, as against the Cross-Defendant, General Electric Credit Corporation, and that all other relief sought by all parties herein should be denied, and it is therefore,

ORDERED, ADJUDGED and DECREED that the Cross-Plaintiff, T. R. Grubbs, have and recover, of and from the General Electric Credit Corporation, damages in the sum of Twenty Thousand and No/100 ($20,000.00) Dollars with interest at the rate of six (6%) percent per annum from date of Judgment until paid, and for all costs of suit. It is further ORDERED that the promissory note from T. R. Grubbs and wife, Syble Grubbs, to General Electric Credit Corporation in the sum of $66,923.47 which is dated March 12, 1964, and which is described in the petition of General Electric Credit Corporation on file herein, be and the same is hereby cancelled and held to be void and of no force or validity, and further that T. R. Grubbs recover nothing against either the General Electric Company and the United States recover nothing against either the General Electric Company or the General Electric Credit Corporation, and that the General Electric Credit Corporation recover nothing against T. R. Grubbs or T. R. Grubbs Tire and Appliance and further that the requests of parties herein for a determination of priority of liens is hereby denied, and that all relief not specifically granted herein is specifically denied.

RENDERED this the 10th day of April, A.D., 1970.

/s/ Joe J. Fisher
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

GENERAL ELECTRIC CREDIT CORPORATION,
Plaintiff,
vs.
T. R. GRUBBS, dba T. R. GRUBBS TIRE & APPLIANCE,
Defendant.

Civil Action No. 1273

MEMORANDUM OPINION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Reproduced from the Appendix filed with No. 71-257 in this Court, ultimately reported as Grubbs v. GECC, 405 U.S. 699 [1972]. Portions not relevant to this Petition omitted).

This suit was originally filed in the District Court of Marion County, Texas, on September 3, 1964, by General Electric Credit Corporation against T. R. Grubbs, doing business as T. R. Grubbs Tire and Appliance. T. R. Grubbs was at that time a regularly franchised dealer for the General Electric Company in Jefferson, Texas. General Electric Credit Corporation provided the financing for customers of T. R. Grubbs who purchased General Electric products.

The cause of action sought to recover judgment on a promissory note executed by T. R. Grubbs in favor of General Electric Credit Corporation dated March 12, 1964, in the principal sum of $66,923.47. T. R. Grubbs pleaded a general denial and asserted as affirmative defenses a failure of consideration and fraud in the inducement. T. R. Grubbs further in October of 1966 asserted a cross-action against the Plaintiff, General Electric Credit Corporation, and against the General Electric Company.

This cross-action alleged damages recoverable for alleged slander and conspiracy to put Grubbs out of business.

On November 1, 1967, T. R. Grubbs joined the United States as a party defendant in his cross-action and requested the State District Court to determine priorities on nine judgments pending against T. R. Grubbs including one in favor of the United States. On or about February 16, 1968, the United States duly filed its petition for removal and thereby removed the case to the United States District Court for the Eastern District of Texas, Marshall Division. The United States filed a cross-action seeking a determination that its judgment lien is a prior, paramount and superior lien on the property of T. R. Grubbs; furthermore the government alleged that default by T. R. Grubbs was occasioned by the wrongful acts of General Electric Credit Corporation and General Electric Company and that the government has thereby sustained actual damages for which it seeks to recover.

Three of the creditors of T. R. Grubbs who hold unpaid judgment liens recovered in state court have intervened in this Court praying that Plaintiff, General Electric Credit Corporation, take nothing by its suit against T. R. Grubbs and that their liens be declared prior and paramount to any judgment recovered by Plaintiffs.

The cause having been tried before the Court without a jury and the Court having considered the pleadings, the evidence and the briefs filed by the respective parties and having been fully advised in the premises, now makes its findings of fact and conclusions of law.

FINDINGS OF FACT

11.

That General Electric Credit Corporation sent "stop payment" letters to the customers of T. R. Grubbs informing said customers not to pay T. R. Grubbs any more

money and that such letters did not sufficiently distinguish between or explain the difference between the accounts owned by General Electric Credit Corporation and those owned by T. R. Grubbs.

12.

That the effect of the mailing of the stop payment letters by General Electric Credit Corporation to the customers of T. R. Grubbs was to cause said customers to stop paying Grubbs their obligations to him.

13.

That during the period from July 1964 to January 1965 the agents, servants and employees of General Electric Credit Corporation visited many of T. R. Grubbs' customers in his trade territory and stated or represented to said customers the following:

(A) That Grubbs had cheated and defrauded General Electric Credit Corporation and such customers and that General Electric Credit Corporation was going to "close him out."

(B) That Grubbs had double financed the merchandise they bought from him and had charged them for merchandise they had not purchased.

(C) That Grubbs had not sent their payments in to General Electric Credit Corporation and that the customer had not gotten credit for their payments and possibly still owed something to General Electric Credit Corporation.

(D) That they should not pay Grubbs anything any more.

(E) That Grubbs had embezzled money from the First Baptist Church of Jefferson, Texas.

(F) That the customers should let General Electric take their property and that the customers should refuse to pay Grubbs any more and that the customers should purchase new merchandise from Oney Butane & Appliance Company.

(G) That Grubbs was being "closed out" and in the future, they should trade with Oney Butane & Appliance Company.

(H) That their receipts showed that they had been overcharged by Grubbs and their receipts showed payments by them in excess of what they owed.

14.

The allegations made by General Electric Credit Corporation's agents to T. R. Grubbs' customers that Grubbs had cheated General Electric Credit Corporation and Grubbs' customers; that Grubbs had double financed merchandise, and that Grubbs had embezzled money from the First Baptist Church of Jefferson were false.

15.

The acts of General Electric Credit Corporation against T. R. Grubbs as found herein constituted unlawful interference by General Electric Credit Corporation with the business of T. R. Grubbs and illegal restraint of trade.

16.

The acts of General Electric Credit Corporation in refusing to purchase and pay for acceptable accounts submitted by T. R. Grubbs for financing after the execution of the note in the sum of $66,923.47 and General Electric Credit Corporation's interference with the attempt of Grubbs to collect on accounts which had been charged back to him constituted failure of consideration for said note.

17.

That after General Electric Credit Corporation had repudiated its agreement with T. R. Grubbs to continue to accept the accounts of Grubbs, it then repossessed the merchandise which it had delivered to him on his floor plan arrangement thereby stripping T. R. Grubbs' store of practically all saleable merchandise and virtually terminating his business.

18.

That the acts of General Electric Credit Corporation in refusing to allow T. R. Grubbs to work, collect or foreclose on the accounts which had been charged back to him and merged into his note deprived T. R. Grubbs of property and funds to which he was legally entitled.

19.

The effect of the acts of General Electric Credit Corporation in taking possession of and selling or converting to its own use property of T. R. Grubbs' customers on which it had no mortgage or lien was to convert and deprive T. R. Grubbs of the value of the property; that General Electric Credit Corporation refused to let T. R. Grubbs know what merchandise it had repossessed on accounts of Grubbs' customers and refused to give him the privilege of purchasing such merchandise to thereby lessen his liability thereon; that T. R. Grubbs had accounts owing to him and his store privately which had not been assigned to General Electric Credit Corporation or anyone else amounting to substantial value which accounts he was prevented from collecting by reason of the unlawful acts of General Electric Credit Corporation as found herein.

20.

That the persons committing the acts described herein on behalf of General Electric Credit Corporation were the

agents, servants and employees of General Electric Credit Corporation and at all said times were acting within the scope of their employment.

30.

That as a result of General Electric Credit Corporation's unlawful acts as found herein, T. R. Grubbs has been damaged in the sum of $20,000 in actual damages.

CONCLUSIONS OF LAW

3.

That Cross-Plaintiff, T. R. Grubbs, suffered injuries which were proximately caused by the unlawful acts or conduct of General Electric Credit Corporation, acting through its agents, servants and employees.

4.

That as a result of the unlawful acts of Cross-Defendant General Electric Credit Corporation, through its agents, servants and employees in forcing the Cross-Plaintiff T. R. Grubbs out of business damaged the Cross-Plaintiff Grubbs in the loss of expected profits and other consequential damages, including loss of business reputation all in the sum of $20,000.00.

Judgment will be entered for Cross-Plaintiff T. R. Grubbs in the sum of $20,000.00 with costs taxed against General Electric Credit Corporation; that Cross-Plaintiffs, T. R. Grubbs and the United States of America, take nothing as against the Defendant, General Electric Company, and denying all other relief prayed for by the parties seeking a determination of priorities of their liens against Defendant Grubbs.

ENTERED this 20th day of March, 1970.

/s/ Joe J. Fisher
United States District Judge

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29961

GENERAL ELECTRIC CREDIT CORPORATION,
Appellant,

v.

T. R. GRUBBS, d/b/a T. R. GRUBBS TIRE & APPLIANCE,
Appellee.

APPELLANT'S BRIEF

To said Honorable Court:

By this appeal from the judgment of the trial court denying Appellant (herein called GECC) judgment against Appellee (herein called Grubbs) and awarding Grubbs a $20,000.00 judgment against it said GECC presents the following issues or points for review:

ISSUES OR POINTS FOR REVIEW

POINT ONE

The trial court erred in denying GECC recovery against Grubbs for the substantial sum shown to be owing, for such right to recover was established by the undisputed evidence and the law applicable thereto.

POINT TWO

The trial court erred in awarding Grubbs a judgment against GECC in that there was no competent evidence showing that any authorized agent or employee of GECC slandered Grubbs or committed any tort against him.

POINT THREE

The trial court erred in awarding Grubbs a judgment against GECC in that Grubbs' alleged cross-action for slander was barred by the one year statute of limitations.

POINT FOUR

The trial court erred in finding and concluding that GECC committed actionable wrongs against Grubbs within two years of the filing of the cross-action.

POINT FIVE

The trial court erred in awarding Grubbs a judgment against GECC in that there was no competent evidence of damages either on the slander or conversion theory.

CONCLUSION

For the reasons set forth hereinabove GECC prays that the judgment of the trial court denying it any recovery against Grubbs and awarding Grubbs a judgment for $20,000.00 against it be reversed, that GECC should recover judgment against Grubbs for $71,965.82 (the principal debt of $65,423.47 sued on plus 10% attorneys' fee of $6,542.35) and for costs including costs of appeal, and that judgment should be entered that Grubbs take nothing against GECC with costs including appeal costs taxed to Grubbs.

Respectfully submitted,

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29,961

GENERAL ELECTRIC CREDIT CORPORATION,
Appellant,

vs.

T. R. GRUBBS, d/b/a T. R. GRUBBS TIRE & APPLIANCE,
Appellees.

APPELLEES' BRIEF

To said Honorable Court:

Appellees respectfully submit that the Honorable Trial Court was eminently correct in rendering judgment for Appellees against G.E.C.C., the Appellant here, and that such judgment, based upon the extensive findings of fact made by the learned Trial Judge, is just and should not be disturbed on appeal.

COUNTER POINT ONE

(GERMANE TO APPELLANT'S POINT ONE)

The Appellant having repudiated its agreement with Grubbs to purchase contracts as in the past, at a time prior to default in the payment of Appellant's note, the Court was correct in cancelling said note and in rendering judgment against Appellant, denying it a recovery on said note.

COUNTER POINT TWO

(GERMANE TO APPELLANT'S POINT TWO)

Appellant having admitted that their agents and employees, James W. Newell and McMichael were repossessing merchandise sold by Appellees, and having received and sold such merchandise after it was repossessed and retained the proceeds, and John W. Newell having testified to such as their witness, they are now estopped to complain of testimony of statements made by such agents as to their authority.

COUNTER POINT THREE

The subject matter of Appellees' cross-action having grown out of the cause of action sued upon by Appellant, and its petition having been filed before running of limitation, the same is not barred by the one or two year statutes of limitation, even if it would otherwise have applied.

COUNTER POINT FOUR

Where a cause of action asserted is predicated upon a series of criminal or unlawful acts, limitation does not begin to run until the last of such criminal or unlawful acts are committed.

COUNTER POINT FIVE

Appellees' cross action was not for slander, but for tortious destruction of Appellees' business, and the one year statute of limitation would not apply in any event.

COUNTER POINT SIX

(GERMANE TO APPELLANT'S POINT FIVE)

The evidence was more than sufficient to authorize the Court to award Appellees the sum of $20,000.00 in damages.

CLOSING STATEMENT

Appellees respectfully submit that the learned Trial Judge who heard the evidence and saw the witnesses and observed their demeanor, correctly determined the facts in this case. His findings of fact, similar to those of a jury, cannot be disturbed if there is any evidence to support them and all evidence must be viewed in the light most favorable to sustaining the judgment. Certainly they should not be disturbed here. We further submit that we have shown that, the facts being as they are, the law required the rendition of the judgment in Appellees' favor. More importantly, justice has been done. We respectfully pray that the judgment be affirmed.

Respectfully submitted,

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29961

GENERAL ELECTRIC CREDIT CORPORATION,
Plaintiff-Appellant,

versus

T. R. GRUBBS, d/b/a T. R. GRUBBS TIRE & APPLIANCE,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

(April 13, 1973)

Before GEWIN, THORNBERRY and CLARK, Circuit Judges.

THORNBERRY, Circuit Judge: General Electric Credit Corporation (GECC), plaintiff below, appeals from a judgment denying it recovery on a note and awarding defendant-appellee Grubbs a $20,000 recovery on his counterclaim. We reverse the judgment below.

Grubbs operated an appliance store in Jefferson, Texas, and sold General Electric products. He financed his purchases of inventory by means of two distinct arrangements with GECC, a wholly-owned subsidiary of General Electric Corporation. Pursuant to the first of these arrangements, known as trust receipts financing or "floor planning," he paid ten percent of the price of inventory purchased from General Electric, and borrowed the balance from appellant. Merchandise purchased under this arrangement was held by Grubbs in trust, and he was to pay GECC the balance of the purchase price promptly upon sale of the merchandise to a customer.[1] Should Grubbs fail to pay the balance promptly upon sale to the customer, the sale was referred to as a "sale out of trust."

Under the second financing arrangement — the one giving rise to the note upon which appellant brought suit — Grubbs sold to GECC chattel mortgages, notes, and other accounts generated by his sales to customers. The 1955 agreement governing these sales of "chattel paper" obligated GECC to purchase only those accounts that it deemed "acceptable." If a customer defaulted on two or more installments under an account sold to GECC, Grubbs was required, upon demand by GECC, to repurchase that account for cash. If, thirty days after GECC had demanded the repurchase of a defaulted account, Grubbs had not repurchased it, then Grubbs became obligated to repurchase *all* of the accounts he had sold to GECC, whether they were in default or not.

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[1]Under the "floor plan" agreement, GECC had the right to accept the customer's account in lieu of Grubbs' payment of the balance.

By March 1964, ninety-four of the accounts that Grubbs had sold to GECC, amounting to roughly $67,000, were in default by two or more installments, and Grubbs had not repurchased them as required by the 1955 agreement. Rather than forcing Grubbs to repurchase all of the outstanding accounts sold to GECC (which by this time numbered 671 and amounted to roughly $270,000, exclusive of the ninety-four defaulted accounts), or suing him on his repurchase obligation, GECC proposed that Grubbs execute a note representing the amount due in cash under the repurchase obligation ($67,000) payable in monthly $1500 installments beginning on April 11, 1964.[2] Grubbs and his wife signed the note, telling GECC representatives that they "owed it and had to pay it anyway." Grubbs and his wife testified that appellant induced them to sign the note by assuring them that they would have the sole right to make collections and repossessions under the ninety-four accounts, and by promising to continue purchasing Grubbs' customers' accounts "as before," which Grubbs understood to mean that appellant would purchase substantially all of the chattel paper he tendered. GECC officials, however, testified that Grubbs' obligation to pay the note was not contingent upon GECC's continued purchase of chattel paper. It is clear, nonetheless, that even if appellant did undertake to "continue" purchasing chattel paper from Grubbs "as before," this would obligate appellant to purchase only the accounts it considered "acceptable": appellant prom-

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[2]In 1963, Grubbs had executed another note to GECC, representing his liability to repurchase $69,000 in defaulted paper sold to GECC.

ised to do nothing more than it was required to do under the 1955 agreement, and that agreement was not materially modified by the March 1964 note.

After paying the first $1500 installment on April 11, 1964, Grubbs refused to make further payments; and GECC sued to recover the balance on September 3, 1964. In October 1966 Grubbs amended his answer in several material respects.[3] First, he asserted that the note was unenforceable because of fraudulent inducement and total failure of consideration. Secondly, he asserted a "cross-action" (actually, a counterclaim against appellant and a third-party action against General Electric Corporation) alleging that appellant and General Electric had violated federal and Texas antitrust laws and that they had embarked upon a scheme resulting in the total destruction of Grubbs' business.[4]

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[3]GECC had brought suit in state court in Marion County, Texas. By his amended pleading, Grubbs made the United States a party to the suit, in order to obtain a determination of priorities among a number of judgment lienholders including the United States (which had obtained judgment under a note assigned to the Small Business Administration). The United States removed the suit to the United States District Court for the Eastern District of Texas.

[4]As to the acts committed in furtherance of this scheme, Grubbs claimed that GECC had refused to purchase any chattel paper from him after execution of the March 1964 note; that GECC employees had repossessed merchandise covered by some of the ninety-four defaulted accounts charged back to Grubbs pursuant to the note, and in so doing had slandered Grubbs; that GECC had notified Grubbs' customers not to make further payments to him; and that GECC had wrongfully terminated trust receipts financing before Grubbs' franchise had expired. Many of the acts alleged as a basis for recovery under the counterclaim against GECC were also asserted as defenses to the note.

The trial judge, sitting without a jury, heard testimony for two days, and then declared the note unenforceable for fraud and failure of consideration, awarded Grubbs a $20,000 recovery against GECC alone on his claim of "destruction of his business," and denied all other claims for relief (including the alleged antitrust violations).

The Note

On appeal, Grubbs reiterates three theories advanced in the court below in support of his claim that the note was unenforceable because of total failure of consideration. First, he argues that he was required to pay the note only if appellant continued to purchase and pay him for chattel paper tendered to it, and that GECC breached this obligation while the note was still current. As mentioned earlier, it is not at all clear what appellant promised in return for Grubbs' signing the note,[5] but in no event did it undertake more than to *continue* purchasing only "acceptable" paper, as it had done under the 1955 agreement. In any event, after Grubbs had made the first payment on April 11, 1964, he tendered approximately $2600 in accounts to GECC, who at first refused to accept them because they were unacceptable credit risks, but who later accepted accounts worth approximately $1530. Rather than sending Grubbs the cash, however, appellant credited this amount to reserve accounts (es-

[5]Under Texas law, Grubbs' pre-existing repurchase obligation was itself sufficient consideration for the 1964 note. Tex.Rev.Civ. Stat.Ann. (Bus. & Comm.) arts. 3.303, 3.408; West Coast Mining Co., Inc. v. Security National Bank, 442 S.W.2d 821, (Tex.Civ.App. — Amarillo 1969, writ ref'd n.r.e.).

tablished to insure Grubbs' performance of his obligations under the financing arrangements) to cover some $1700 in worthless checks (drawn by Grubbs and by his customers) that Grubbs had tendered as customer payments on accounts sold to GECC and as remittances from Grubbs in payment for trust receipt merchandise.[6] Since the financing arrangements required Grubbs to cover any worthless checks he sent to GECC, there was no practical difference between sending Grubbs the cash and crediting his account to cover the checks. This incident, therefore, was not a failure of consideration. Likewise untenable is the claim that the note was induced by a fraudulent promise to continue purchasing Grubbs' chattel paper. In refusing to accept some accounts, and in crediting the proceeds of others to the reserve accounts, GECC did no more than it had a right to do under the original agreements with Grubbs.

The second alleged instance of failure of consideration was appellant's sending "direct pay" notices to Grubbs' customers, instructing them to make remittances directly to GECC. Appellant was authorized to make collections on accounts that it had purchased; but Grubbs argued that in some cases a notice was sent to a customer, one of whose accounts had been purchased by GECC but whose other account either

[6] In response to a hypothetical question, a GECC official testified that GECC violated the March 1964 agreement by crediting $1530 to Grubbs' reserve account instead of sending him the cash. But the hypothetical question made no reference to the worthless checks that Grubbs had sent to GECC; thus, this testimony affords no basis for finding failure of consideration in appellant's crediting the money to the reserve account.

had not been sold to GECC or had been charged back to Grubbs pursuant to the March 1964 note. These customers, unable to distinguish between accounts owed to GECC and accounts owed to Grubbs, simply stopped paying Grubbs altogether, although Grubbs allegedly was to have the sole right to make collections and repossessions on the ninety-four defaulted accounts represented by the March note. As of August 1964, when the direct pay notices were sent, however, Grubbs was in default on the note, having repudiated it in May or June; and Grubbs will not be heard to justify that repudiation by events occurring months later. It is even possible that sending the direct pay notices to the ninety-four defaulted accounts was not in violation of the March agreement, because GECC officials testified that Grubbs was to have a right to make collections on those accounts only if he continued paying the note.

Thirdly, Grubbs contends that termination of trust receipts financing before his franchise expired was a failure of consideration. But there is absolutely no evidence that continuation of trust receipts financing was promised in consideration for the note. Moreover, when trust receipts financing was terminated in August 1964, Grubbs was "short" by over $6,000 due to "sales out of trust," and admittedly could not make up the shortage.

In summary, the trial court erred by denying recovery to GECC on the note. Appellant is entitled to recover the balance due under the note, plus reasonable attorneys' fees (Tex.Rev.Civ.Stat.Ann. art. 2226).

The Counterclaim

Here we are concerned only with GECC's alleged liability for the acts it committed pursuant to the scheme to "totally destroy" Grubbs' business. The trial court exonerated General Electric Corporation, and denied Grubbs' claims under the anti-trust laws; and Grubbs does not allege that that part of the judgment was erroneous.

Besides the conduct which we have seen to be authorized by Grubbs' agreements with GECC,[7] the allegedly wrongful acts fall roughly into four categories: (1) failure to credit Grubbs for the price of some inventory removed from his floor when trust receipts financing was terminated;[8] (2) "slanderous accusations" by GECC employees that Grubbs had cheated both his customers and GECC by failing to remit customer payments on accounts purchased by GECC; (3) the mailing of "direct pay" notices to accounts that Grubbs had the exclusive right to collect; (4) appellant's wrongful repossession from customers of merchandise on which it had no lien, and its sale of that merchandise without giving Grubbs the right to bid.

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[7]Although Grubbs sought affirmative recovery for appellant's failure to purchase and pay for some customers' accounts and for terminating trust receipts financing in August 1964, the foregoing discussion has shown that none of these acts was improper under Grubbs' agreements with GECC.

[8]Appellant concedes that Grubbs is entitled to credit for such merchandise. The trial produced only a rough estimate (approximately $1,000) of the amount of this credit, and on remand the trial court must establish precisely the amount of credit due Grubbs.

"Slanderous Accusations":[9] Several of Grubbs' customers testified that men who "represented themselves to be" or "purported to be" GECC employees[10] visited them in 1964 and 1965, and said that Grubbs had swindled them and cheated GECC by failing to remit to GECC customer payments collected by Grubbs and owed to GECC under accounts GECC had purchased. In order to hold GECC liable for these statements, Grubbs of course had the burden of proving that the men were in fact GECC employees and that the statements were made in the course of their employment; but we have combed the record in vain for competent proof of either of these elements. The customers' recollections of what the men represented themselves to be was hearsay,[11] and Texas courts hold that such testimony, even if admitted without objection, is no proof at all of agency or scope of employment. *Lewis v. J. P. Word Transfer Co.*, 119 S.W.2d

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[9]Appellant contends that these statements, made between July 1964 and January 1965, give rise to a cause of action in slander; since recovery was not sought for them until October 1966, when Grubbs amended his pleading, Grubbs' recovery for these statements is, says appellant, barred by the Texas one-year statute of limitations applicable to slander. On the other hand, Grubbs argues that the statements were merely part of a scheme designed to ruin his business, and that the one-year statute is inapplicable under Brown v. American Freehold Land Mortgage Co., 97 Tex. 599, 80 S.W. 985 (1904). Owing to the approach we take to this part of Grubbs' counterclaim, we intimate no view as to this controversy.

[10]None of these men testified at trial.

[11]The representations of agency cannot even be brought within the amorphous confines of Texas' "res gestae" exception to the hearsay rule. Grubbs made no attempt to show that the purported agents were "in the instant grip of violent emotion, excitement or pain," 1 McCormick & Ray, Texas Law of Evidence 684 (2d ed. 1956), while "representing" themselves to be GECC agents.

106 (Tex.Civ.App. — Dallas 1938, writ ref'd). Even if the "men" themselves had testified, their testimony standing alone would not have supported a finding of agency. *Robertson Tank Lines, Inc. v. VanCleave*, 468 S.W.2d 354 (Tex. 1971). Grubbs was not entitled to any recovery for the allegedly "slanderous accusations" made to his customers.

"Direct Pay" Notices: From our review of the record, we cannot say that the trial court clearly erred in determining that GECC was liable to Grubbs for the injury caused by sending "direct pay" notices to customers some of whose accounts were owed solely to Grubbs. We are, however, unable to determine how many of Grubbs' (as distinct from GECC's) accounts were sent the notices, or to determine the amount of customer payments that Grubbs lost when his customers stopped paying in reliance on the notices. We accordingly remand to the court below for determination of the amount of damages due Grubbs for GECC's mailing the direct pay notices.

Wrongful Repossession and Sale: Again, appellant does not seriously dispute Grubbs' claim of damages for GECC's repossession from customers of merchandise on which GECC had no lien. Some of the repossessed merchandise had been purchased from Grubbs on open account, and Grubbs had not financed his purchase of the merchandise with GECC. Other repossessed merchandise was covered by the ninety-four defaulted accounts represented by the March 1964 note, and we cannot say that the trial court clearly erred in finding that Grubbs had the sole right to make collections and repossessions on these accounts. GECC disposed of this repossessed merchandise in two sales.

During the first, Grubbs and his wife's brother-in-law were permitted to bid on the merchandise after opening the bids of other prospective purchasers. Grubbs was not, however, permitted to bid at the second sale. But again we are compelled to remand to the court below for a precise determination of the amount of damages caused by the wrongful repossessions and sale.

Needless to say, we cannot accept the trial court's award of $20,000 as a blanket recovery for "destruction of Grubbs' business." The evidence tended to show that Grubbs had been operating at a loss prior to the events giving rise to the instant suit, and that it was only a matter of time until his business failed. On remand, Grubbs' recovery is to be limited to (1) credit for "trust receipt" merchandise which was not credited to him when trust receipts financing was terminated, (2) Grubbs' losses on accounts which he had the sole right to collect, caused by the mailing of the "direct pay" notices, and (3) credit for merchandise wrongfully repossessed from Grubbs' customers and sold.

In summary, we reverse as to the trial court's failure to award GECC a judgment on the note; we reverse the award of $20,000 in damages on Grubbs' counterclaim, and remand for a precise determination of damages on his counterclaim.

Costs shall be taxed to appellee.

REVERSED AND REMANDED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

GENERAL ELECTRIC CREDIT CORPORATION, Plaintiff	X	
VS.	X	Civil Action No. 1273
T. R. GRUBBS, dba T. R. GRUBBS TIRE & APPLIANCE, Defendant.	X	

FINAL JUDGMENT

BE IT REMEMBERED that on the 2nd day of April, 1974, came on to be heard the rehearing for additional findings of fact in the above numbered and styled cause of action. Came the Plaintiff by and through its attorney of record, and came the Defendant in person and by and through his attorney of record, both parties announcing ready. The Court took further evidence to aid it in making its further findings of fact. After reviewing the evidence, both of the original trial and the rehearing, and reviewing the briefs and arguments of counsel, the Court

determines that judgment should be and is hereby entered as follows:

It is ORDERED, ADJUDGED and DECREED that General Electric Credit Corporation, Plaintiff herein, recover of and from T. R. Grubbs, Defendant herein, the sum of $70,195.14 as principal and accrued interest to date, after deducting all credits and setoffs, on the promissory note forming the basis of Plaintiff's cause of action, and that General Electric Credit Corporation further recover of and from T. R. Grubbs the sum of $7,019.51 as its attorney's fees as contractually provided for in said note, making a total recovery of $77,214.66.

It is further ORDERED, ADJUDGED and DECREED that T. R. Grubbs, Defendant and Cross-Plaintiff herein, recover of and from General Electric Credit Corporation, Plaintiff and Cross-Defendant herein, the sum of $105,609.78 as damages on his cross action. Offsetting the amount owing on the promissory note of $77,214.65, Cross-Plaintiff, T. R. Grubbs, is entitled to receive the

amount of $28,395.13 in damages, and JUDGMENT is so ENTERED.

Costs shall be taxed one-half against Defendant and Cross-Plaintiff, T. R. Grubbs, and one-half against Plaintiff and Cross-Defendant, General Electric Credit Corporation.

Signed and Entered this 18th day of July, 1974.

/s/ Joe J. Fisher

United States District
Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

GENERAL ELECTRIC CREDIT CORPORATION,	X	
Plaintiff and Cross-Defendant	X	
VS.	X	Civil Action
T. R. GRUBBS, dba T. R. GRUBBS TIRE & APPLIANCE,	X	No. 1273
Defendant and Cross-Plaintiff	X	

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MEMORANDUM

Came on for consideration the above-styled and numbered cause on remand from the Fifth Circuit Court of Appeals with the following instructions:

> "On remand, Grubbs' recovery is to be limited to (1) credit for 'trust receipt' merchandise which was not credited to him when trust receipts financing was terminated, (2) Grubbs' losses on accounts which he had the sole right to collect, caused by the mailing of the 'direct pay' notices, and (3) credit for merchandise wrongfully repossessed from Grubbs' customers and sold."

The Court, having considered the evidence adduced therein, the pleadings, briefs of counsel in support thereof, and having been fully advised on the premises, now makes and files its Findings of Fact and Conclusions of Law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

1.

The Plaintiff, General Electric Credit Corporation, is entitled to recover on the promissory note dated March 12, 1964, less credits and offsets set out below, plus interest at the rate of six (6%) per cent per annum from the date of default to the date of judgment, plus attorney's fees. The principal balance due on said note at maturity on February 11, 1968, is the amount of $65,423.47.

2.

While the Court is of the opinion that the Defendant, T. R. Grubbs, should be entitled to offset the $29,672.81 Reserve Account kept by the Plaintiff, General Electric Credit Corporation, at the termination of Grubbs' franchise, this account does not fit into any of the three categories of fact issues which this Court was instructed to consider by the Fifth Circuit Court of Appeals. Further, the Defendant Grubbs has agreed to forego any right to collect the account. Therefore, the Court will not make a finding of fact that this Reserve Account is to be an offset against the promissory note indebtedness.

3.

The Defendant, T. R. Grubbs, suffered damages in the amount of $4,494.39 for the loss of trust receipt merchandise not credited to him when the trust receipt financing of his inventory was terminated by the Plaintiff, General Electric Credit Corporation. However, the Defendant Grubbs was short by over $6,000.00 due to sales out of trust

at the time of termination, as was noted by the Fifth Circuit Court of Appeals in its opinion and, therefore, Defendant Grubbs will not be entitled to any credit for trust receipt merchandise.

4.

The Plaintiff, General Electric Credit Corporation, concedes that the Defendant Grubbs has suffered damages in the amount of $16,500.00 as a result of the wrongful possession of property by General Electric Credit Corporation, on which property Grubbs held a lien and General Electric Credit Corporation did not. The Defendant Grubbs is thus entitled to a credit in the amount of $16,500.00 against General Electric Credit Corporations's recovery on its note.

5.

The principal balance due on the note dated March 12, 1964, here sued on is $65,423.47, and after all credits and offsets have been allowed in the amount of $16,500.00, the balance due on said note is $48,923.47. The date of default on said note is February 11, 1968, from which date inter-

est has accrued in the amount of $21,271.67. Also, Plaintiff, General Electric Credit Corporation, is entitled to its attorney's fees in the amount of $7,019.51 for a total of $77,214.65.

CROSS ACTION

6.

T. R. Grubbs, Defendant and Cross-Plaintiff, gave testimony concerning his ability to collect each and every account which the Court of Appeals on remand requested the trial court to hear. Mr. Grubbs testified that he had operated a service station in Jefferson, Texas, where many of the persons who are listed in his accounts had traded with him as far back as the 1950's and many were customers during the years he operated the business of T. R. Grubbs Tire & Appliance Company. In addition to his testimony, which was uncontradicted, Mrs. E. M. Smith testified that for a number of years she managed the Marion County Retail Merchants Association. Her testimony was to the effect that she had checked every name of the persons listed on both of the instruments introduced, and that she

had marked them on these instruments, designating by check mark the persons against whom no complaint had been made as to their reliability to pay their obligations, and that those persons of whom she had no record, she had designated "no record." Those persons who were shown to have had a complaint filed against them were designated as an "0". The records of the Marion County Retail Mercants Association confirmed the testimony of Cross-Plaintiff Grubbs as to his estimate of these accounts he could have collected if he had not been prevented from doing so by acts of the Cross-Defendant, General Electric Credit Corporation. This testimony was not only uncontroverted, but appears to be reasonable and credible. The following is an itemization of damages shown to have been suffered by Mr. Grubbs:

ACCOUNTS MERGED INTO NOTE AND STORE ACCOUNTS:

Good Credit	$25,697.68		
No File	17,146.81		
T O T A L		$42,844.49	
Some Complaint	$25,936.18 (75%)	19,452.12	$62,296.61

STORE ACCOUNTS:

Good Credit	$24,889.42		
No File	20,869.34		
T O T A L		$45,758.76	
Some Complaint	$31,987.80 (75%)	23,990.85	69,749.61
	TOTAL DAMAGES		$132,046.22

The Court, therefore, finds that Cross-Plaintiff Grubbs suffered damages in the amount of $62,296.61 on the ninety-four (94) accounts merged into the promissory note, and the amount of $69,749.61 on his store accounts for total damages of $132,046.22 as a result of the "direct pay" notices sent by Cross-Defendant, General Electric Credit Corporation.

7.

The amount of damages suffered by Cross-Plaintiff Grubbs as a result of the illegal and unfair conduct of Cross-Defendant, General Electric Credit Corporation, was uncontraverted. In fact, the Cross-Defendant, General Electric Credit Corporation, made no effort to offer an accounting of the amount collected from the ninety-four (94)

accounts merged into the promissory note, or the store accounts. The record is completely silent in this regard. The Court, therefore, finds that Cross-Plaintiff Grubbs could have collected the greater portion of these accounts but for the "stop pay" letters sent out by Cross-Defendant, General Electric Credit Corporation, and thus the actions of the Cross-Defendant, General Electric Credit Corporation, effectively prevented Cross-Plaintiff Grubbs from collecting at least eighty (80%) per cent of said accounts, and the Cross-Plaintiff, T. R. Grubbs, is entitled to recover the sum of $105,609.78 damages on his cross-action.

CONCLUSIONS OF LAW

Plaintiff, General Electric Credit Corporation, is entitled to recover the sum of $77,214.65 on the promissory note, and the Cross-Plaintiff, T. R. Grubbs, is entitled to recover the sum of $105,609.78 on his Cross Action. Offsetting these amounts, Cross-Plaintiff, T. R. Grubbs, is entitled to receive the amount of $28,395.13 in damages, and judgment will be so entered.

DATED this 18th day of July, 1974.

/s/ Joe J. Fisher

United States District
Judge

GENERAL ELECTRIC CREDIT CORPORATION, Plaintiff-Appellant,

v.

T. R. GRUBBS d/b/a T. R. Grubbs Tire & Appliance, Defendant-Appellee.

No. 74-3186.

United States Court of Appeals, Fifth Circuit.

June 2, 1975.

Plaintiff credit corporation brought action against defendant appliance dealer to recover on a note. The dealer counterclaimed. The credit corporation appealed from a judgment denying recovery and awarding the dealer a $20,000 recovery on his counterclaim. The Court of Appeals, 478 F.2d 53, reversed and remanded. After remand, the United States District Court for the Eastern District of Texas at Marshall, Joe J. Fisher, Chief Judge, entered judgment in favor of the dealer on the counterclaim and the credit corporation appealed. The Court of Appeals held that in view of its directions on remand concerning the elements of the appliance dealer's recovery on the counterclaim, an award in excess of that given in the original trial was not foreclosed by the dealer's failure to cross appeal and complain of the initial award.

Affirmed.

Courts ⇐406.9(21)

In view of Court of Appeals' directions on remand concerning the elements of defendant appliance dealer's recovery on his counterclaim against plaintiff credit corporation, an award in excess of that given in the original trial was not foreclosed by the dealer's failure to cross appeal and complain of the initial award.

Appeal from the United States District Court for the Eastern District of Texas.

Before CLARK, Associate Justice,* and GOLDBERG and AINSWORTH, Circuit Judges.

PER CURIAM:

The judgment of the trial court is affirmed. Careful examination of the record shows that the trial judge's findings are not clearly erroneous. As to the claim of appellant that any award of damages in excess of $20,000 was foreclosed by Grubbs' failure to cross-appeal and complain of the initial award in this amount (which was specifically denied by the trial judge by order dated February 26, 1974, but not mentioned in his memorandum of decision dated July 18, 1974, and which is the basis of our affirmance) we need only point to the language of this court on remand of the case:

> Needless to say, we cannot accept the trial court's award of $20,000 as a blanket recovery for "destruction of Grubbs' business." . . . On remand Grubbs' recovery is to be limited to (1) credit for "trust receipt" merchandise which was not credited to him when trust receipts financing was terminated, (2) Grubbs' losses on accounts which he had the sole right to collect, caused by the mailing of the "direct pay" notices, and (3) credit for

* Of the Supreme Court of the United States, (Retired) sitting by designation.

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merchandise wrongfully repossessed from Grubbs' customers and sold.

. . . [W]e reverse the award of $20,000 in damages on Grubbs' counterclaim, and remand for a precise determination of damages on his counterclaim.

478 F.2d 53, 58 59.

Affirmed.